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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 169

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

vs.

CHELTENHAM & ABINGTON SEWERAGE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, BRIEF IN SUPPORT THEREOF AND MOTION AS TO RECORD.

CLAUDE T. RENO,
Attorney General of Pennsylvania,
HARRY M. SHOWALTER,
SAMUEL GRAFF MILLER,
HERBERT S. LEVY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
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v.

CHELTENHAM & ABINGTON SEWERAGE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Pennsylvania Public Utility Commission, respectfully prays that a Writ of Certiorari issue herein to review a certain final decision of the Supreme Court of Pennsylvania which is the highest Court of Appeal in the said State. The decision of the State Supreme Court was rendered on March 23, 1942.

Summary of Matter Involved.

This case challenges the power of the Pennsylvania Public Utility Commission to hold Cheltenham and Abington Sewerage Company, a utility rendering sewerage service for compensation to the public within Pennsylvania, liable for the payment of reparations for collecting rates which were contained in a tariff approved by the Commission, but which produced, to the certain knowledge of the utility, an over-all gross annual revenue in excess of that previously prescribed by the Commission.

On October 6, 1930, The Public Service Commission of the Commonwealth of Pennsylvania, predecessor of petitioner, issued an order whereby it directed that the rates of respondent be reduced to provide a gross annual revenue not in excess of $36,140.00. A tariff designed to yield such revenue was duly filed and became effective July 1, 1931, with the approval of the Commission.

In August, 1933, the Commission instituted informal conferences with representatives of respondent seeking reductions of rates after an investigation of respondent's books indicated that respondent was collecting annual amounts in excess of those permitted by the Commission.

After informal negotiations had failed to secure a rate decrease, the Commission, on December 11, 1934, instituted formal proceedings to determine the reasonableness of respondent's rates and subsequently, on August 30, 1935, an order was entered reducing the allowable gross annual revenue to $27,700.00. An appeal from this order was taken to the Superior Court of Pennsylvania, which increased the annual allowance to $30,050.00. Respondent thereafter filed a tariff effective January 1, 1937, complying with the Superior Court order. Charges for the entire period, July 1, 1931 to January 1, 1937, were in accordance with the terms of the tariff effective July 1, 1931.

In the meantime, on October 17, 1935, certain of respondent's consumers filed with the Commission a reparation peti-

tion for damages allegedly sustained by reason of the collection of the rates contained in the tariff of respondent effective July 1, 1931. On September 23, 1940, your petitioner issued its order finding that respondent was liable for the payment of reparations for the period from October 17, 1933 to January 1, 1937. An appeal was thereupon taken by respondent to the Superior Court of Pennsylvania which held that respondent had no liability for reparations on collections of rates prior to December 11, 1934, the date upon which the Commission instituted its formal rate proceeding against respondent. This decree was appealed by respondent to the Supreme Court of Pennsylvania and, on March 23, 1942, that Court rendered the decision review of which is sought by this petition.

The opinion of the Pennsylvania Supreme Court affirmed the decree of the Superior Court with the modification that August 30, 1935, the date of the Commission order establishing final rates, was fixed as the earliest date from which respondent could be liable for reparations. The Pennsylvania Supreme Court decided that the rates contained in a tariff which was approved by the Commission, were the lawful and reasonable rates upon which the utility was entitled to rely until duly changed by Commission order. This decision constitutes a holding that the utility may knowingly disregard the limitations placed by the Commission upon the amount of gross annual revenue. Any attempt to award reparations for collections in excess of the allowable gross annual revenue but in accordance with the filed tariff of the utility was held to amount to confiscation of the utility's property. The Pennsylvania Supreme Court's decision was based chiefly upon the authority of a decision of this Court, namely: **Arizona Grocery Co. v. Atchison, Topeka & S. F. Railway Co., 284 U. S. 370 (1932).**

Jurisdiction.

The decision of the Supreme Court of Pennsylvania sought to be here reviewed was entered March 23, 1942, and is reported at 344 Pa. 366 and 22 A(2d) 37. The record is pres-

ently in the possession of the Clerk of this Court by reason of an appeal taken by respondent from the decision of the Supreme Court of Pennsylvania. Jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended, which provides as follows: (27 U. S. C. A. 344)

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Respondent before the Commission and the Courts below raised the Federal question that its property had been taken without due process of law in that it had been held liable for the payment of reparations. This issue was decided in respondent's favor and against petitioner by the Supreme Court of Pennsylvania, in so far as liability for reparations during the period December 11, 1934, to August 30, 1935, is concerned.

Statutes Involved.

The Statute of the Commonwealth of Pennsylvania which is here involved, is the Act of July 26, 1913, P. L. 1374, as amended by the Act of Assembly of July 12, 1931, P. L. 530 (66 Purdon's Penna. Statutes l f. f.), the pertinent provisions of which are set out as follows:

Article V, Section 3, of the Act of July 26, 1913, P. L. 1374 (66 Purdon's Penna. Statutes 492):

> "Whenever the commission shall determine, after hearing, had upon its own motion, or upon complaint, that the rates, fares, tolls, or charges established, demanded, exacted, charged, or collected by any public service company or companies, for any service rendered or furnished, are unjust or unreasonable or inadequate, or are unjustly discriminatory or unduly or unreasonably preferential; or that the facilities or service furnished or rendered by any public service company or companies are unjustly discriminatory, or unduly or unreasonably preferential; in favor of or against any particular person, corporation, locality, or any particular kind or description of traffic or service,—then the commission shall determine, and prescribe by a specific order, the maximum, just, due, equal, and reasonable rates, fares, tolls, and charges to be thereafter established, demanded, exacted, charged, or collected for the service to be performed; and the just, due, equal, reasonable, and proper regulations and practices, as affecting such rates, to be observed by the public service company; and the commission may classify such rates. The said order shall be served, as hereinafter provided, upon all public service companies by which such rates, fares, tolls, and charges, and such regulations and practices affecting the same, are thereafter to be charged and observed. The power to fix maximum rates or charges shall include the power to fix joint rates or charges where joint service is rendered by two or more public service companies, or where other public service companies may be interested in the rate or charge."

Article V, Section 5, of the Act of July 26, 1913, P. L. 1374 (66 Purdon's Penna. Statutes 511):

> "If, after hearing, upon complaint or upon its own motion, the Commission shall determine that any rates which have been collected * * * were in violation of any order of the Commission, or were unjust or unreasonable or unjustly discriminatory or unduly or unreasonably preferential; or, in like manner, shall find that the rates so collected are in excess of the rates contained in the tariffs or schedules of any such public service company * * * the Commission shall * * * have the power and authority to make an order for reparation * * *
>
> "No reparation, as herein provided, shall be awarded by the commission unless the complaint or petition shall have been filed with it within two years from the time authority to make an order for reparation * * *.

Question Presented.

Where a sewage utility knowingly collects rates which, although in accordance with a tariff approved by a regulatory commission, produced gross annual collections in excess of those permitted by prior Commission order, is it violative of the due process clause of the Federal Constitution for the Commission to hold the utility liable for reparations with regard to the portion of such collections made prior to a Commission order directing the filing of a new tariff?

Reasons Relied Upon For Writ of Certiorari.

This Court has never passed upon the question of whether a utility can rely upon a tariff prepared by it and approved by the Commission after it has certain knowledge that the annual collections made in accordance with the provisions of the said tariff are in excess of allowable annual gross revenues prescribed by prior Commission order.

The decision of this Court in **Arizona Grocery Co. v Atchison T. & S. F. Railway Co., 284 U. S. 370,** which the Supreme Court of Pennsylvania considered controlling

here, and which is the only Federal decision cited in the opinion of that Court, did not involve a Commission determination of the permissible annual gross revenues of the utility. It involved solely a Commission determination and prescription of specific railroad freight rates for the transportation of certain commodities between specific points and the right of the utility to rely thereupon. The instant case presents a new question, namely, whether in cases where the Commission sets the maximum annual revenue level the utility can escape reparations for excess knowingly collected upon the sole ground that the Commission had approved the tariff under which the excess collections were made.

The establishment of the rates of a utility often requires two steps, one of which must precede the other. The first is determination of the maximum allowable revenues. This step is taken only after full hearing and mature consideration of all facts relating to the utility property and business. The second is the establishment of a rate schedule providing for such revenues. This step involves preparation of tariffs by the utility and approval thereof by the Commission. Such approval necessarily can be only tentative and based upon estimates projected into the future. It cannot be supported by experience data. Under the decision of the Supreme Court of Pennsylvania, the latter step is held to a legislative act upon which the utility is entitled to rely, although this holding practically nullifies the effect of the Commission determination of the proper revenue level. It will be of great importance both to the parties here involved and to the utility consuming public in Pennsylvania in general to have a decision as to whether or not a utility is relieved of the duty of compliance with a Commission order prescribing permissible maximum revenue level, by virtue of the fact that the Commission has approved a rate schedule apparently designed, to comply with the prior rate order. Such a decision will definitely inform both the utility and the Commission as to their duties with respect to keeping the utility charges currently reasonable and will inform the consuming public as to the exact amount of protection which may be expected against the exaction of excessive rates.

Conclusion

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, requiring that Court to certify the whole record of the case herein to this court for its review and determination.

Respectfully submitted,

Claude T. Reno

CLAUDE T. RENO,
Attorney General
of Pennsylvania

HARRY M. SHOWALTER,
SAMUEL GRAFF MILLER,
HERBERT S. LEVY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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No.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

v.

CHELTENHAM & ABINGTON SEWERAGE COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Pennsylvania Supreme Court in the decision here sought to be reviewed held that because the rates involved were collected pursuant to a tariff approved by the Commission on July 1, 1931, which was not invalidated by Commission Order until August 30, 1935, the Commission lacked power to award reparations for any portion of that period. The sole Federal case cited as authority for so holding is **Arizona Grocery Co. v. Atchison T. & S. F. Railway Co., 284 U. S. 370 (1932).**

We submit that the Arizona Grocery Company Case is clearly distinguishable from the case at bar.

In the Arizona Grocery Company Case the Interstate Commerce Commission in 1921 reduced rates on sugar from California points to Phoenix, Arizona from $1.045 to 96.5c per 100 lbs. The carrier subsequently made voluntary reductions to

84c. In 1925 the Commission prescribed a rate of 71c for the future and thereafter, in 1929, declared that all past rates were unreasonable to the extent that they exceeded 71c. Reparations were awarded from 1922 on the 71c basis. The carriers refused to pay the reparations awarded, and the shippers sued and recovered therefor in the Federal District Court. The Circuit Court of Appeals reversed the District Court, and that judgment was upheld by this Court. In the course of its opinion this Court stated (284 U. S. 390):

> "Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

In the present case, the Commission did more than approve specific rates for certain of the utility's services; it prescribed the allowable gross annual revenue which the utility might collect for all of its services and later approved the tariff prepared by the company and purporting to provide such revenue. Thereafter, collections made in accordance with the said tariff, to the certain knowledge of the utility, produced revenues in excess of those permitted by the Commission, and the Commission held the utility liable to make reparations for a portion of such excess collection. The Commission here did not attempt to declare a previous finding of reasonableness erroneous as did the Interstate Commerce Commission in the Arizona Grocery Company case. The basis of the Commission award of reparations here is not that the utility had collected more than the Commission should have permitted it to collect, but that the utility had collected more than the Commission actually permitted it to collect, namely, $36,140 annually.

Petitioner does not seek a change in the so-called "Commission made rate" rule established by the Arizona Grocery Company case, but seeks to determine its proper application. The position of petitioner is that where a Commission has determined allowable over-all revenues and later has approved a tariff submitted by the utility as calculated to yield such revenues, the total revenues permitted by the Commission, and not the tariff should be considered the "Commission made rates."

The reasons for this position are plain and cogent. The adjustment of the general revenue level to the demands of a fair return is the result of careful study and research by the Commission, arrived at only after full and extensive hearings and after a thorough and comprehensive review of the record. It represents the considered judgment of the Commission as to the total amount the utility should be permitted to earn in view of the value of property, its operating expenses, and the return due its investors. The full experience of the utility is available to the Commission in making a determination of proper future revenue allowances.

On the other hand, the approval of a rate schedule prepared by the utility and purporting to conform to the general revenue level prescribed by the Commission can be at most only a tentative expression by the Commission that its limitation on over-all revenues seems likely to be observed. At the time such approval is given, the Commission is able only to estimate that the filed tariff will produce no more than the permissible revenues since the results depend upon future conditions which can only be surmised. All of the elements which make for certainty when the Commission, at the conclusion of a rate proceeding, sets a general revenue level are absent when the Commission is called upon to approve the reasonableness of a company tariff purporting to attain the revenue level.

In view of these essential differences in the character of the two Commission actions here involved we strongly contend that the utility should be bound by the former and that the latter should not be considered a legislative act of the Com-

mission upon which the utility is entitled to reply. It is contrary to logic and sound regulatory practice to permit a utility to rely upon a Commission finding which is incapable of certainty and at the same time to ignore a Commission finding on the same subject which represents an accurate and intelligent determination of the matter involved. It is submitted that the Commission obviously did not intend its approval of the tariff to supersede its earlier finding of maximum allowable revenues and consequently there is no reason to hold that the award of reparations was a retroactive repeal by the Commission of its own legislative act as to the reasonableness of the rate it had fixed.

It is petitioner's position that the only time the Commission fixed reasonable rates in this case was when it prescribed the maximum over-all revenues of the utility. Its action in approving the utility's tariff was merely a permission to the utility to place the rate schedule in effect as the legally collectible rates of the company and decided nothing whatever with respect to their reasonableness. See **Suburban Water Co. v. Oakmont Borough,** 268 Pa. 243 (1920).

The utility was entitled to collect only the total amount fixed by the Commission and all collections in excess of that amount were unreasonable. An award of reparations in the amount of the excess represents purely the return of money to which the utility had no right under the Commission action.

Wherefore, petitioner prays that your Honorable Court will issue a writ of certiorari to review the final decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

CLAUDE T. RENO,
Attorney General
of Pennsylvania
HARRY M. SHOWALTER,
SAMUEL GRAFF MILLER,
HERBERT S. LEVY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 169

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Petitioner,

vs.

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Respondent.

MOTION TO CONSIDER PETITION ON TYPEWRITTEN RECORD FILED IN NO. 160, OCTOBER TERM, 1942.

Petitioner, Pennsylvania Public Utility Commission, respectfully represents:

1. The attached petition for writ of certiorari is addressed to the same proceedings as the appeal of Cheltenham & Abington Sewerage Company *v.* Pennsylvania Public Utility Commission, No. 160, October Term, 1942.

2. The record in the instant proceeding is identical with the record in the said appeal at No. 160, October Term, 1942.

3. Petitioner suggests that the record to be printed in the instant proceeding would substantially duplicate the record in the said appeal at No. 160, October Term, 1942, thus involving unnecessary printing and expense.

Wherefore, it is respectfully moved that your Honorable Court consider the attached Petition for Certiorari upon the record filed in the said appeal No. 160, October Term, 1942.

Respectfully submitted,

CLAUDE T. RENO,
Attorney General of Pennsylvania,
HARRY M. SHOWALTER,
SAMUEL GRAFF MILLER,
HERBERT S. LEVY,
Counsel for Petitioner.

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AUG 8 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

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No. 169.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,
vs.
CHELTENHAM & ABINGTON SEWERAGE COMPANY.

BRIEF OF CHELTENHAM AND ABINGTON SEWERAGE COMPANY CONTRA PETITION OF PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR A WRIT OF CERTIORARI.

George Henry Huft,
Counsel for Respondent.
Keough, Huft, Bohan & Kitchen,
Of Counsel.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn. Race 6067.

BRIEF OF CHELTENHAM AND ABINGTON SEWERAGE COMPANY CONTRA PETITION OF PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR A WRIT OF CERTIORARI.

The petition for a writ of certiorari to the Supreme Court of Pennsylvania, filed by the Pennsylvania Public Utility Commission with this Court, states that the question presented is as follows:

> "Where a sewage utility knowingly collects rates which, although in accordance with a tariff approved by a regulatory commission, produced gross annual collections in excess of those permitted by prior Commission order, is it violative of the due process clause of the Federal Constitution for the Commission to hold the utility liable for reparations with regard to the portion of such collections made prior to a Commission order directing the filing of a new tariff?"

and further states, under the heading "Reasons Relied Upon for Writ of Certiorari," that "it will be of great importance both to the parties here involved and to the utility consuming public in Pennsylvania in general to have a decision as to whether or not a utility is relieved of the duty of compliance with a Commission order prescribing permissible maximum revenue level, by virtue of the fact that the Commission has approved a rate schedule apparently designed to comply with the prior rate order."

It is submitted that the question thus presented is already before this Court by virtue of an appeal taken by respondent from the same judgment of the Supreme

Court of Pennsylvania which the said Commission is now attempting to have reviewed—the said appeal having been allowed by order of Associate Justice Roberts under date of May 12, 1942 and docketed to No. 160, October Term 1942—as is plainly indicated by the following points contained in the Statement of Points Upon which Appellant Intends to Rely filed with this Court by respondent:

> "(1) That appellant was entitled to collect the rates set forth in its tariff effective July 1, 1931, which were prescribed or adopted prior to their effective date by the Public Service Commission of Pennsylvania acting in its quasi-legislative capacity, until January 1, 1937, the date as of which it was ordered by said Commission, in compliance with the direction of the Superior Court of Pennsylvania acting in its quasi-legislative capacity, to file a new tariff providing for reduced rates, without incurring any liability for reparations whatsoever."
>
> "(2) That the legislative act over which the Commission has jurisdiction in such case is the fixing of rates, and not the fixing of gross annual revenues independent of rates."
>
> "(3) That any finding and determination holding appellant liable for reparations for any portion of the period beginning July 1, 1931, and ending January 1, 1937, is unlawful, confiscatory and in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States."

and that a determination of said points by this Court will definitely answer the question which the Pennsylvania Public Utility Commission propounds in its said petition for a writ of certiorari.

It is therefore the contention of respondent that the Pennsylvania Public Utility Commission has not presented any reason which would justify this Court, in the exercise

of its sound judicial discretion, in granting its petition for a writ of certiorari to the Supreme Court of Pennsylvania, and that therefore certiorari should be denied.

Respectfully submitted,

GEORGE HENRY HUFT,
Counsel for Cheltenham and Abington Sewerage Company, Respondent.

KEOUGH, HUFT, BOHAN & KITCHEN,
Of Counsel.